

ORIGINAL

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1 V I R G I N I A:

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3 - - - - - X

4 NETWORK SOLUTIONS, LLC, :
5 Plaintiff, : Civil Case No:

6 vs. : CL-2007-00011510

7 NEXUS HOLDINGS INC., et al, :
8 Defendants. :
9 - - - - - X

10 January 10, 2008
11 Fairfax, Virginia

12 The above-entitled action came on to be
13 heard before THE HONORABLE JANE MARUM ROUSH, a Judge
14 in and for the Circuit Court of Fairfax County, in
15 Courtroom 5-B, Fairfax County Judicial Center, 4110
16 Chain Bridge Road, Fairfax, Virginia 22030,
17 beginning at approximately 10:05 o'clock, a.m.,
18 before Barbara S. Price, a Verbatim Reporter, when
19 there were present on behalf of the respective
20 parties:
21
22
23

1 APPEARANCES:

2 On behalf of the Plaintiff:

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12 On behalf of the Defendant:

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<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>
Natalie Sterling	20, 66	51
Michael Vincent Cocozza	69, 85	79

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PROCEEDINGS

(Whereupon, the court reporter was duly
sworn by the clerk of court.)

4 THE COURT: Good morning. This is the
5 case of Network Solutions versus Nexus Holdings Inc,
6 et al. Counsel and parties ready for trial?

7 MR. MCKAY: Ready for the hearing, Your
8 Honor.

9 THE COURT: All right.

10 MR. MCKAY: My name is Jack McKay from
11 Pillsbury Winthrop on behalf of Network Solutions.
12 I have Alison Rousseau with me.

13 THE COURT: All right.

14 MR. SUROVELL: Good morning, Your Honor.
15 Scott Surovell on behalf of Brett Gottlieb,
16 appearing specially. We are ready to proceed.

17 THE COURT: There should be a big sign in
18 front of you saying this is a special appearance.
19 All right. Opening statements?

20 MR. MCKAY: Do you want to go first since
21 it's your plea?

1 jurisdiction, I think, create procedural confusion
2 in terms of how they proceed. I'm not sure what
3 Your Honor's practice is on them.

4 THE COURT: I don't think I've had enough
5 of them to actually develop a practice. I would say
6 that you are the moving party.

7 MR. SUROVELL: Right. Well, I believe
8 what the cases say is that -- I think the burden is
9 on the plaintiff to establish personal jurisdiction
10 in their case. The only evidence that I have today
11 -- I've already given it to the plaintiff's counsel
12 -- is an affidavit of nonresidence. There's another
13 sentence in there that says, "I haven't done
14 anything to avail myself to the jurisdiction of
15 Virginia," pretty much. There is a statute --
16 Virginia Code section that says an affidavit of
17 nonresidence is *prima facie* evidence of
18 nonresidence. So I presume that affidavit is
19 permissible in this proceeding. That's really the
20 only evidence that my client intends to present
21 today.

22 THE COURT: Well, I can sort out the
23 burden. But why don't you go ahead and make an

1 opening statement and introduce your affidavit.

2 Then I can hear from the plaintiff.

3 MR. SUROVELL: Well, Your Honor, I think
4 the issues here today are -- You can divide them
5 into maybe three categories. There might be a
6 forth.

7 The first one, the more nuclear one, is
8 whether or not there has been a general appearance
9 made, and whether or not that moots the
10 jurisdictional issues or not.

11 The second issue -- which is not really an
12 evidentiary question, I don't think. I think Your
13 Honor can just look at the file and make the call on
14 that. There might be some --

15 THE COURT: You know, I lost that motion
16 when I was an attorney. I filed a motion for the
17 extension of time -- a consent order for the
18 extension of time. I thought it had to be a
19 pleading that actually went to the merits of the
20 case. But Judge Middleton disagreed with me.

21 MR. SUROVELL: Right.

22 THE COURT: And I felt I had really gotten
23 stuck with that. But I don't know that I've had to

1 rule on it since then. That was a long time ago.

2 MR. SUROVELL: Well, I'm glad you're
3 emotionally predisposed to favoring my position.

4 Your Honor, I would submit that in this
5 case, the only thing that my client would submit
6 would potentially get them to that, that you'll hear
7 about, is the consent. I guess it was a joint
8 request, or something, to extend time to file a
9 response.

10 THE COURT: Weren't there also deposition
11 notices, as well?

12 MR. SUROVELL: Yes. My client sent out a
13 deposition notice indicating intent to take our
14 client's deposition for purposes of the hearing
15 today. And Judge Ney eventually quashed that, and
16 said that the rules didn't permit us to take our
17 client's -- to use a deposition in this hearing
18 today. We had argued, among other things, that the
19 constitution couldn't possibly require somebody,
20 who's contesting a personal jurisdiction action, to
21 show up in the jurisdiction in person to contest it;
22 that there are some due process issues with that.
23 In addition, we didn't think the rules guided you

1 there. But, in any event -- There was that.

2 And I think there was a scheduling
3 appearance to schedule this, to set some briefing
4 schedules and some dates. From our point of view,
5 the extension of time thing is about the closest
6 they can get to a waiver. We don't think it
7 constitutes a waiver. We don't think simply asking
8 for more time to file your objection of personal
9 jurisdiction or file your plea in bar could be
10 construed as responding. Making a general
11 appearance, or responding on the merits to a case,
12 exceeds what the Supreme Court has -- lines the
13 Supreme Court has drawn. That, I think, is the
14 first issue.

15 The second issue, Your Honor, is whether
16 or not this contract provision in some way gets my
17 client into this court. I think you're going to
18 hear evidence that there was three or four different
19 possible contracts entered into, based on click
20 boxes on a website. That's going to be the evidence
21 I think the other side presents. The contract
22 provision, Your Honor, you'll hear is not absolutely
23 definitive that the jurisdiction is in Fairfax. It

1 talks about the Eastern District of Virginia and
2 other courts. And there will be some arguments as
3 to that.

4 The third set of issues has to do with
5 whether or not, absent the contract, there's
6 sufficient personal jurisdiction due to minimum
7 contacts, both under the due process clause and the
8 Virginia long arm statute. Again, my client's
9 evidence is going to be that there really aren't
10 any. Their evidence is going to be that he was, I
11 guess, on their website clicking boxes and clicking
12 on things, and that gets them there.

13 And then the last set of issues has to do
14 with whether or not this litigation in California
15 has any bearing on the hearing today. I'll submit,
16 Your Honor -- I've showed it to Mr. McKay. But I
17 brought with me a stack of pleadings that have been
18 filed in California in the U.S. District Court out
19 there. And one of the things that we felt we
20 clearly couldn't do was file a motion to stay the
21 proceedings, because of the jurisdictional issue.
22 But we wanted to make the court aware that there is
23 this litigation pending in California, which, in

1 part, is about which jurisdiction this case ought to
2 be litigated in, whether it ought to be litigated in
3 California or Virginia.

4 THE COURT: Of course we're first in time,
5 both in the initiation of the lawsuit and in
6 conducting this hearing; correct?

7 MR. SUROVELL: My understanding is -- I
8 think that's correct. The class action suit, Your
9 Honor, was filed on October 4th, 2007. I think this
10 action might have been filed --

11 MR. MCKAY: September 21st.

12 MR. SUROVELL: Right. And I think there
13 were some letters exchanged between counsel, which
14 is what prompted this suit to be filed. So I think
15 there is a first in time issue relative to that.

16 I don't know if there's any really clear
17 Virginia Supreme Court authority on that issue
18 though, in terms of first in time or anything else.
19 I think there's some circuit court authority about
20 it. But I don't think there's any Supreme Court
21 authority about comity vis a vis that issue.

22 THE COURT: Well, I happen to know the
23 time in divorce cases. If someone files for divorce

1 in Virginia and somebody else would rather be in
2 another state, generally we defer to the first in
3 time.

4 MR. SUROVELL: Well, there are some UIFSA
5 issues in that. And UCCJEA issues I think in those,
6 that sort of have ancillary application, depending
7 on what's at issue, I guess. But that's definitely
8 a general rule about that. I agree about that, at
9 least in divorces, Your Honor.

10 But there is a hearing I think set for the
11 25th of January --

12 MR. MCKAY: Yes, in California.

13 MR. SUROVELL: -- where these issues about
14 jurisdiction are theoretically going to be argued.
15 And, again, I have a stack of pleadings, which I was
16 going to hand up to the court at the appropriate
17 time.

18 From our point of view, Your Honor, our
19 client hasn't had any contacts with Virginia
20 sufficient to render him subject to suit here. He's
21 a California resident. And this matter ought to be
22 resolved in California.

23 THE COURT: All right. Opening statement?

1 MR. MCKAY: Your Honor, Mr. Surovell has,
2 I think, laid out accurately the three issues that
3 are before the court today.

4 Just a bit of background: Our evidence
5 will show that Mr. Gottlieb, from 2003 to 2007, on
6 each annual occasion, both registered with Network
7 Solutions and renewed that registration with Network
8 Solutions for a domain name registration and for e-
9 mail services on each of those occasions, 2003,
10 2004, 2005, 2006 and 2007. And the one in 2007, he
11 actually renewed his service after this suit was
12 filed.

21 Our evidence will show that on each of
22 those occasion, the way the system is set up, that
23 one had to click on that box. If you didn't click

1 on that box, then you got an error message.

2 THE COURT: Nobody ever reads that stuff.

3 MR. MCKAY: I know, Your Honor. But I
4 think we all, unfortunately, are probably bound by
5 it.

6 THE COURT: Oh, I know. But have you ever
7 analyzed how long people actually spend on that
8 site? I mean, it must be a nanosecond.

9 MR. MCKAY: Not to my knowledge, Your
10 Honor. I know what I do. I can give you my
11 anecdotal information.

12 THE COURT: I press agree, agree, agree,
13 agree, agree, to get down to where I have to give
14 them my credit card information.

15 MR. MCKAY: And move on. But the
16 agreement was there. The hyperlink was there to get
17 to the agreement. And it includes, as Your Honor
18 will see, in each of those agreements that were
19 applicable in those years, a forum selection clause
20 that says suits will be brought in the State of
21 Virginia -- either in federal court, if there is
22 jurisdiction; or if not, in this court.

23 Your Honor, there are three bases for

1 jurisdiction here. And I think that we make what in
2 some cases is called a *prima facie* case involving
3 jurisdiction quite easily.

4 The first is the general appearance.
5 And Your Honor highlighted what we think is
6 consistent. Judge Ellis' ruling was consistent with
7 the Virginia law that's laid out in our opposition.
8 When you go beyond contesting jurisdiction, then
9 you've made a general appearance.

10 In this case we have three instances of
11 action: We have a request for continuance. And
12 there are Virginia cases directly on point that a
13 request for continuance is a general appearance.
14 We have the invocation of the court's discretionary
15 power to permit the defendant to exceed the page
16 limits when he was filing his motion to quash.
17 And then we have the defendant sending a notice of
18 his own deposition, which he wanted to set for San
19 Francisco, California. And that, as Mr. Surovell
20 has correctly said, was quashed by Judge Ney.

21 But we think that when you take either one
22 of those three, and certainly when you take all
23 three, there was a general appearance entered here.

1 And, therefore, the other issues that we might have
2 to decide today, really don't have to be addressed.

3 The second prong on which jurisdiction is
4 available here to this court, is the forum selection
5 clause in the service agreements. Those clauses
6 are, under the law, *prima facie* valid, unless there
7 is a showing by the defendant, the out of state
8 party, that for some reason, they are not valid.
9 And there is going to be no showing, apparently in
10 this case, of the fact that there is any reason for
11 invalidity.

12 And the forum selection clause that
13 Network Solutions has in its agreements has actually
14 been upheld in about half a dozen cases, which we've
15 cited in our briefs. So it's a fairly established
16 agreement. Network Solutions has two million
17 customers. And these get litigated from time to
18 time. It has been upheld on at least six reported
19 opinions.

20 And the last prong, Your Honor, if we had
21 to get to the constitutional question -- And I don't
22 think you have to, because I think consent, either
23 by general appearance or by the forum selection

1 clause, either of those is a basis for jurisdiction
2 without considering constitutional issues.

3 But if Your Honor felt the need to
4 consider constitutional issues, we have an out of
5 state resident here who entered into a business
6 contract with a company in Virginia. And he agreed
7 to their forum selection clause and agreed to their
8 service agreement, in general. He sends e-mails
9 every day over servers in Virginia. And the
10 testimony will be today that Network Solutions has
11 servers only in Virginia. And that it was a
12 necessity, both in the registration process, and the
13 renewal process. And every e-mail he sends gets
14 transmitted over a server located in Virginia.

15 This is clearly an instance whereby using
16 those facilities for his own purposes, whether they
17 be personal or business, he has availed himself
18 consciously of the benefits of transacting business
19 in Virginia by using those facilities in Virginia.
20 That would fall under the general provisions of the
21 long arm statute.

22 And of course we have the specific
23 provisions in 8.01-328.1(B) about using computer

1 networks in Virginia, and that constitutes an act in
2 the Commonwealth. And the cases that we cite will
3 be directly on point here to show that that is
4 sufficient in itself, even apart from the general
5 statute, to permit the court to exercise
6 jurisdiction.

7 I can address the California proceeding if
8 Your Honor wishes when we have closing statements.
9 So let me just say that what's at issue here today
10 is just a matter of jurisdiction. It's not whether
11 this case should go forward or not go forward, or
12 whether it should be stayed or not be stayed, or
13 what's going on in California. You have one
14 question before you today, and that's the plea in
15 bar to assert personal jurisdiction over Mr.
16 Gottlieb. And those other issues, it seems to me,
17 about what's going on in California, are completely
18 irrelevant to today.

19 THE COURT: All right. Thank you. Mr.
20 Surovell?

21 MR. SUROVELL: I have an affidavit here,
22 Your Honor. May I approach, Your Honor?

23 THE COURT: Yes, sir. All right. Are

1 there any objections to this affidavit?

2 MR. MCKAY: Your Honor, I just discussed
3 with Mr. Surovell, while we took a moment here, that
4 I'm not going to object to the affidavit. And the
5 exhibits that I'm presenting, he's not going to
6 object to them. So we've agreed to that. And,
7 therefore, we'll let the affidavit come in.

8 THE COURT: All right.

9 MR. MCKAY: He'll ask questions about my
10 exhibits. But he's going to let them come into
11 evidence, as well.

12 THE COURT: All right. This will be
13 admitted as Defendant's Exhibit Number 1.

14 (The item referred to above was
15 identified and received into
16 evidence as Defendant's Exhibit
17 No. 1.)

18 MR. SUROVELL: You Honor, I have a copy of
19 the Code section if you want to see it. It's an
20 affidavit about nonresidence being prima facie
21 evidence.

22 THE COURT: Sure. All right. And with
23 that, the defendant rests?

1 MR. SUROVELL: Your Honor, I have these
2 pleadings from California. One of them was taken
3 on PACER this morning. My client's counsel e-mailed
4 me the others. I was going to ask the court to take
5 judicial notice of them.

6 THE COURT: All right. You can hand those
7 up.

11 THE COURT: No, what?

14 THE COURT: Do you want them back?

17 THE COURT: That's fine.

18 MR. SUROVELL: I just thought about it
19 more carefully. And I'm going to hold off on that.

20 THE COURT: Okay. So the defendant rests?

21 MR. SUROVELL: Yes, ma'am.

22 THE COURT: All right. Mr. McKay?

23 MR. MCKAY: Yes, Your Honor. We would

1 call Natalie Sterling.

2 THE COURT: All right.

3 (Whereupon, the witness was sworn by the
4 court's clerk.)

5 MR. MCKAY: Your Honor, I have a copy of
6 the exhibits that we will go through with the
7 witness to provide to Your Honor.

8 THE COURT: Yes, that's fine.

9 MR. MCKAY: Those actually are the
10 originals, Your Honor.

11 THE COURT: Yes. It would be best if I
12 have the originals.

13 (The items referred to above
14 were identified as Plaintiff's
15 Exhibits Nos. 1 through 8.)

16 Whereupon,

17 NATALIE STERLING

18 the witness, was called for examination by counsel
19 on behalf of the plaintiff, and, after having been
20 duly sworn by the court's clerk, was examined and
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MR. MCKAY:

1 Q Ms. Sterling, would you state your name
2 for the record?

3 A Natalie Sterling.

4 Q Where are you employed?

5 A Network Solutions.

6 Q And how long have you worked for Network
7 Solutions?

8 A I've worked there for two years, back from
9 2002 to 2004. And I've just started again in July
10 of 2007.

11 Q Okay. When you worked there in 2002 to
12 2004, what was your position?

13 A I was a fraud analyst.

14 Q And what is the job of a fraud analyst?

15 A We investigate incoming credit card fraud.

16 Q In your work as a fraud analyst from 2002
17 to 2004, what occasion did you have to learn how the
18 systems worked in the interrelation between Network
19 Solutions and its customers?

20 A We go through a one month training process
21 where we learn all of the products and services that
22 Network Solutions provides, as well as the
23 registration, renewal, service agreement, and just

1 the ins and outs of the company.

2 Q And beyond the training that you received,
3 in your work as a fraud investigator, what occasion
4 did you have to learn about how the company does
5 business, in terms of its relation with its
6 customers?

7 A We would learn the different financial
8 transactions that took place, and also the customer
9 account histories.

10 Q You came back to work when?

11 A In July of 2007.

12 Q What were you doing from 2004 to 2007?

13 A From 2004 to 2007, I also worked as a
14 fraud investigator for a telecom company.

15 Q When you came back in 2007, what was your
16 job title?

17 A Subpoena compliance administrator, and
18 also investigator.

19 Q And what are your duties as a subpoena
20 compliance investigator?

21 A For subpoena compliance, I receive all of
22 our incoming subpoenas, review them for accuracy,
23 and then I also go through all of the customer

1 account histories and payment histories, and provide
2 requested documentation.

3 THE COURT: So all those things I sign
4 from the Fairfax County Police, trying to get the
5 customer information, you're the one who receives
6 those?

7 THE WITNESS: Yes.

8 THE COURT: Okay.

9 MR. MCKAY: So there's a source of a lot
10 of your work.

11 THE COURT: A lot apparently. I've had
12 about three or four of them this week. Although I
13 don't think any of them are for Network Solutions.

14 THE WITNESS: I haven't seen any for them.

15 BY MR. MCKAY:

16 Q All right. Tell the court generally what
17 Network Solutions does?

18 A Generally, we're a domain name registrar.
19 And we also provide associated services, such as e-
20 mail and web hosting.

21 Q And "domain name registrar" means what?

22 A To register a domain name would be -- Like
23 Natalie.com, you would need to go to a registrar in

1 order to register that name.

2 Q It could also be Natalie.net; couldn't it?

3 A Correct.

4 Q Or .org?

5 A Yes.

6 Q How many companies are there that actually
7 provide domain registration services today?

8 A There are approximately nine hundred
9 companies.

10 Q Now, you mentioned also that Network
11 Solutions provided e-mail accounts?

12 A Yes, they do.

13 Q That's similar to my AOL account?

14 A No, it's different. It's related to your
15 domain name. So if you wanted to have an e-mail
16 associated with your domain name, you would have
17 Natalie@Natalie.com. We wouldn't provide any other
18 type of e-mail. It's just for that domain name.

19 Q Now, does Network Solutions do its
20 business with respect to providing e-mail to
21 customers, over servers?

22 A Yes, they do.

23 Q And where does it have servers located?

1 A The servers are in Sterling, Virginia.

2 Q And does Network Solutions have servers
3 located outside of Virginia?

4 A No, they do not.

5 Q Approximately, how many customers does
6 Network Solutions have?

7 A Approximately, two million customers.

8 Q And are they in the United States only?

9 A No. They are international as well.

10 Q To buy the services of Network Solutions,
11 to register a domain name and buy an associated
12 service such as the e-mail account, what generally
13 does the customer have to do? We'll go through it
14 in more detail. But, generally, what does the
15 customer have to do?

16 A Generally, they would go to our website,
17 NetworkSolutions.com. And there is a process that
18 they would go through to purchase the domain name
19 and the e-mail product.

20 Q Now, let me ask you, if you would, to look
21 at Exhibit Number 1 that you have in front of you.

22 A Yes.

23 Q Would you tell the court, without going

1 into detail, about Exhibit Number 1? Actually, let
2 me ask this question about 1, 2, and 3, all of which
3 look alike.

4 A Okay.

5 Q What are Exhibits 1, 2, and 3?

6 A Exhibits 1, 2 and 3 -- Exhibit 1 is the
7 registration process for a new domain name.

8 Q Are these screen shots?

9 A These are screen shots that I took off of
10 our website that show the purchase flow.

11 Q All right. Plaintiff's Exhibit Number 1
12 are screen shots related to what?

13 A The purchase of a domain name and e-mail.

14 Q All right. And Exhibit Number 2, those
15 screen shots relate to what process?

16 A This is for the renewal of e-mail and
17 domain name services.

18 Q And the third set of screen shots, Exhibit
19 Number 3, what are they?

20 A This is the customer account history from
21 our internal system.

22 Q And that's the customer account history
23 for Mr. Gottlieb?

1 A Yes, it is.

2 MR. SUROVELL: Objection. My objection is
3 to leading, in terms of who it's for. The document
4 speaks for itself.

5 THE COURT: All right. I'll overrule the
6 objection. A certain amount of leading is permitted
7 to transition the witness into an area.

8 BY MR. MCKAY:

9 Q Ms. Sterling, let's move to Exhibit Number
10 1 --

11 A Okay.

12 Q -- the registration process.

13 A Yes.

14 Q And we can move through these, I think,
15 fairly quickly. First of all, does this accurately
16 represent what a customer sees or would see, at
17 least as of today --

18 A Yes, it does.

19 Q -- as they began the registration process?

20 A Yes.

21 Q What's the first page? Describe that to
22 the court.

23 A The first page is the first screen that

1 you would see if you went to NetworkSolutions.com.

2 Q And what are the options on that first
3 page?

4 A On this first page, if you were looking to
5 purchase a domain name, you would go under the "Find
6 a domain name," type in the domain name that you're
7 checking to see if it's available for registration,
8 and then you would hit the green "search" button to
9 proceed to the next screen.

10 Q And in this example, you typed in "Natalie
11 Sterling"?

12 A Yes, I did.

13 Q All right. Turn to the second page of
14 Plaintiff's Exhibit 1, and tell the court what
15 functions go on on that page?

16 A The second page is the results page. It's
17 going to tell you if that domain name is available
18 for registration. In this instance, it was
19 available. The .com was taken. But the .net was
20 available for registration. So to purchase that
21 domain name, you would just click on the "Add
22 domains to order."

23 Q The green button in the center of the

1 page?

2 A Correct.

3 Q And once you did that, would you be taken
4 to page 3?

5 A Yes, you'll be taken to page 3.

6 Q All right. What is page 3?

7 A Page 3 is just asking you if you would
8 like to keep your registration information public or
9 private. And you could make that choice, and then
10 click "continue."

11 Q And that takes you to page 4?

12 A That takes you to page 4. This is asking
13 you if you would like to add additional hosting
14 packages. If you do not, then you would just click
15 "continue" without adding hosting.

16 Q Okay. Then you would be taken to page 5.
17 What are your options there?

18 A Page 5 is asking if you would like to add
19 additional services to your order. For instance, at
20 the bottom of that page you could select to add e-
21 mail to your order at that time. And you could
22 select the number of e-mail boxes from the drop-
23 down.

1 Q All right. Page 6?

2 A Page 6 is just additional services that
3 you could select, as well as page 7. And at the
4 bottom of page 7 is the "continue" button that would
5 take you to the next process in the purchase flow.

6 Q All right. So by the time you get to page
7, you have made what choices you want with respect
8 to products that you are purchasing?

9 A Yes, you have.

10 Q So you get to page 8. And what's page 8?
11 What is its relationship to the customer
12 transaction?

13 A Page 8 is the shopping cart. It's telling
14 you what you've selected for purchase. In this
15 instance, it's selecting the domain name and the e-
16 mail. And it also gives you the choice of the term
17 that you wish to register those products for.

18 Q And is the default five years?

19 A The default is five years. On the next
20 page I had selected it down to one year.

21 Q So on page 9 of Exhibit 1 you selected one
22 year?

23 A Yes, I did.

1 Q And did that then generate a price for the
2 services?

3 A Yes, it does.

4 Q And are those the prices of the services
5 that are in effect at Network Solutions today for
6 the services that you've checked?

7 A Yes, they are.

8 Q So what's the price for the domain name
9 registration?

10 A For the domain name, it's \$34.99. And for
11 the e-mail box, it's \$20.00. And those are annual.

12 Q Okay. Back when you were with Network
13 Solutions in 2002 to 2004, were those the charges at
14 that time?

15 A Yes, they were.

16 Q All right. So on page 9, if you proceed
17 to purchase, what happens next?

18 A When you proceed to purchase, it takes you
19 to a "log-in" or "create account" screen.

20 Q Is that page 10?

21 A Yes, it is page 10. And if you were a
22 previous customer, you would add your user ID and
23 password for your current account. If you are a new

1 customer, then you would just fill out the new
2 customer information, your name, address. And then
3 the continuation is on page 11. It's going to ask
4 you for your phone number, e-mail, to select a user
5 ID and password, and also answer a security
6 question.

7 Q So that's all part of, sort of, giving
8 information into the system?

9 A Correct. You are setting up your account.

10 Q All right. So once you've done that, you
11 get to page 12?

12 A Yes.

13 Q What happens on page 12?

14 A On page 12 you will enter the credit card
15 information, the billing address information. And
16 there's also a section where you would read and
17 agree to the terms of the service agreement.

18 Q All right. Now, that appears at the
19 bottom of page 12?

20 A Yes, it does.

21 Q Would you tell me what happens, first of
22 all, if you click that box?

23 A When you click that box and hit "secure

1 checkout," you would proceed through the checkout
2 process to purchase the domain name and e-mail.

3 MR. SUROVELL: Your Honor, I just want to
4 assert an objection -- this might be more
5 appropriate for cross examination -- as to
6 foundation, her ability to be able say exactly what
7 this button is programmed to do, its function. I
8 mean, she might have looked at a screen, but that
9 doesn't necessarily mean she has got personal
10 knowledge to be able to testify as to exactly what
11 that will do. I believe there's a foundational
12 issue.

13 THE COURT: I'll overrule the objection.
14 I do think it's an issue for cross examination.

15 MR. SUROVELL: Okay.

16 BY MR. MCKAY:

17 Q Ms. Sterling, at the time you produced the
18 screen shots that are a part of Exhibit Number 1,
19 did you attempt to proceed from the screen that is
20 on page 12, without checking the box that's called
21 "service agreement"?

22 A Yes, I did.

23 Q And what happened?

1 MR. SUROVELL: Objection. It's hearsay.

2 THE COURT: I'll overrule the objection.

3 THE WITNESS: When I clicked on that
4 button and proceeded, I received an error that the
5 service agreement terms must be selected in the box
6 below to proceed.

7 BY MR. MCKAY:

8 Q And there's another opportunity then on
9 page 13 to click on the service agreement?

10 A Yes.

11 Q In your work preparing these screen shots,
12 did you click on the link to Network Solutions
13 service agreement?

14 A Yes, I did.

15 Q And where did it take you?

16 A It took me to a dynamic service agreement,
17 showing me the service agreement for the products I
18 had purchased.

19 MR. SUROVELL: Same objection.

20 THE COURT: I'll overrule the objection.

21 BY MR. MCKAY:

22 Q Would you look at page 14 of Exhibit 1?

23 A Yes.

1 Q And what is that?

2 A That is the service agreement that would
3 come up when I clicked on the link.

4 Q Is that the one that did come up?

5 A Yes, it is.

6 Q And is that the whole agreement or only
7 part of it?

8 A This is just a snapshot of the agreement.
9 But, yes, the whole agreement would come up for the
10 products I purchased.

11 Q Did they come up?

12 A Yes, they did.

13 Q And this is just the first page that we
14 put in as an exhibit?

15 A Correct.

16 Q Now, when you were at Network Solutions in
17 2002 to 2004 --

18 A Yes.

19 Q -- was the customer registration process,
20 as you described it now, in place in 2002 to 2004?

21 A Yes, it was.

22 Q And did that include the fact that in 2002
23 to 2004, if the customer failed to click that he had

1 read and agreed to the service agreement, that he
2 would get an error message?

3 A Yes.

4 MR. SUROVELL: Objection. Foundation and
5 hearsay.

6 THE COURT: I'll overrule the objection.

7 MR. SUROVELL: The answer is "yes"? I'm
8 sorry I was talking when you answered.

9 THE WITNESS: Yes.

10 MR. SUROVELL: All right. I just wanted
11 to make sure.

12 BY MR. MCKAY:

13 Q All right. Let's turn now to Exhibit
14 Number 2, which you described as being the screen
15 shots for the renewal process?

16 A Correct.

17 Q Tell the court what appears on page 1 of
18 Exhibit 2?

19 A Page 1 is the log-in screen where the
20 customer would log-in to their account. They would
21 just enter their user ID and password and click
22 "log-in."

23 Q All right. And once that has been done by

1 the customer, what happens?

2 A It will take them to an account screen
3 that shows the products in their account. They
4 would place a check mark in the boxes that they wish
5 to renew those products. And then click the "renew"
6 button.

7 Q And did you go through this process
8 recently to produce these screen shots?

9 A Yes, I did.

10 Q All right. So tell the judge what
11 happened when you got to page 3?

12 A On page 3, it's just asking you again if
13 you would like to add at this time any additional
14 hosting to your products. You can add the hosting,
15 or you can take it without.

16 Q All right. And are there more pages
17 offering additional services?

18 A Yes. The next page 4 is additional
19 services. Page 5 is additional services. And page
20 6 is additional services.

21 THE COURT: You folks are like Jiffy Lube.
22 You know, it advertises a \$29.95 oil change. But by
23 the time I got out of there, I spent \$250. They

1 bring out that dirty air filter, and I fall for it
2 every time.

3 BY MR. McKAY:

4 Q All right. Ms. Sterling, if we simply
5 move beyond the offer of these services, let's turn
6 to page 7. Tell the court what that is?

7 A Page 7 is the shopping cart. It's
8 summarizing the products that you are renewing at
9 that time.

10 Q All right. In this case, there were
11 actually three products the way you set this one up;
12 correct?

13 A Correct. In the account that I was in,
14 yes, there were three products that were renewed.

15 Q All right. And to get out of page 7 of
16 Exhibit 2, do you click on "proceed to purchase"?

17 A Correct.

18 Q What happened when you clicked on "proceed
19 to purchase"?

20 A When you click on "proceed to purchase,"
21 it's going to take you to the payment information
22 screen. This screen again is asking you for the
23 credit card information and the credit card billing

1 address. And there's also a section where you need
2 to check the box to agree to the terms of the
3 service agreement to proceed.

4 Q And is that all on page 8 of Exhibit 2?

5 A Yes, it is.

6 Q Now, when you went through this process to
7 run these screen shots recently, did you attempt to
8 proceed beyond page 8 by clicking on "secure
9 checkout" without clicking the box about the service
10 agreement?

11 A Yes, I did.

12 Q And what happened?

13 MR. SUROVELL: Your Honor, so I don't have
14 to go over this and assert the same objection as I
15 did before, if Your Honor can just note a continuing
16 objection to anything she testifies to about
17 clicking on links or boxes. It's so I don't have to
18 keep standing up and interrupting.

19 THE COURT: All right. I'll overrule the
20 objection as to hearsay.

21 MR. SUROVELL: Okay. Thank you, Your
22 Honor.

23 THE COURT: Go ahead.

1 BY MR. MCKAY:

2 Q When you went through this process
3 recently to produce the screen shots that are
4 Plaintiff's Exhibit Number 2, did you attempt to
5 move beyond page 8 without clicking on the "I agree
6 to the service agreement"?

7 A Yes, I did.

8 Q What happened?

9 A You receive the error on page 9 that says,
10 "You must agree to the terms of the service
11 agreement by selecting the box below."

12 Q Did you, as part of this renewal process,
13 click on the hyperlink that's on page 8 and also on
14 page 9 to the service agreement?

15 A Yes, I did.

16 Q And where were you led?

17 A I was led to the service agreement for the
18 products that I was attempting to renew.

19 Q And, once again, on page 10, what you have
20 included is the first page of that service
21 agreement?

22 A Correct, it's the first page.

23 Q When did you return to Network Solutions

1 in 2007?

2 A In July.

3 Q And since you've been at Network Solutions
4 on this return visit -- you said in July 2007 -- do
5 you have knowledge of whether the renewal process
6 that you've just described to the court has been in
7 place when a customer was attempting to renew
8 services with Network Solutions?

9 A Yes, it was in place.

10 Q You know it?

11 A Yes.

12 Q And was that process that you've just
13 described to the court in place since you returned
14 to Network Solutions in July of 2007?

15 A Yes.

16 MR. SUROVELL: Objection. I think I'm
17 objecting to foundation.

18 THE COURT: I think they've laid the
19 foundation that she's familiar with how all of this
20 works during the time that she has been at the
21 company.

22 MR. SUROVELL: While she was there, okay.
23 I wasn't sure --

4 MR. SUROVELL: Okay. I was looking at
5 something else. And I wasn't sure I heard the
6 complete question. I was going to object if it was
7 anything outside of when she was employed.

12 MR. SUROVELL: Okay.

13 BY MR. MCKAY:

14 Q And the process that has been in place
15 since July of 2007, to your knowledge, with respect
16 to renewal processing, included the requirement to
17 check the box regarding the service agreement in
18 order to be able to complete a renewal?

19 A Yes.

20 Q The agreements that you brought up when
21 you clicked on the hyperlink, were agreements that
22 are available to the customer to read; is that
23 correct?

1 A Yes, it is.

2 Q Are those agreements changed from time to
3 time?

4 A Yes, they are.

5 Q And how do you, as a subpoena compliance
6 officer, when you get a request or an agreement for
7 a particular time, how do you know that you're
8 pulling the agreement that relates to the particular
9 time period of the subpoena?

10 A When the service agreements are updated,
11 the legal department prints out a copy of that
12 service agreement and places it in a binder by date,
13 so that we know which service agreement applies
14 during a specific time period.

15 Q So when you go back in the normal course
16 of your duties as a subpoena compliance
17 administrator, what is the process by which you
18 would then find the correct agreement for the right
19 period?

20 A Based on the date. If the person is
21 requesting to have a service agreement for a
22 specific time frame, I would just then go to those
23 binders and pull that service agreement.

1 Q And to your personal knowledge, do the
2 service agreements in the period of 2003 to 2007,
3 all contain a forum selection clause?

4 A Yes, they do.

5 Q Now, let's turn to Exhibit Number 3. You
6 told the court in response to an earlier question of
7 mine, a general question, these are the account
8 records for Mr. Gottlieb's account?

9 A Yes, they are.

10 Q Tell the court the process by which you
11 produced these screen shots that are marked as
12 Plaintiff's Exhibit 3?

13 A I searched our database and was able to
14 find an account under the name of Nexus Holdings
15 with Brett Gottlieb as the primary user. And I took
16 screen shots of each of the screens in that account
17 history.

18 Q So tell the court, please, when you took
19 the screen shot of what's marked now as page 1 of
20 Plaintiff's Exhibit 3, what does that show?

21 A This is showing the customer account
22 information, the account holder, and the primary
23 user.

1 Q All right. Did you move beyond that first
2 page?

3 A Yes, I did.

4 Q And what did you find, initially, about
5 this account?

6 A The next page, on page 2, is showing the
7 products that were available that he had purchased.

8 Q That he had purchased?

9 A Yes, that he had purchased. And that
10 shows the domain name of Nexus Holdings.

11 MR. SUROVELL: Your Honor, I would object
12 to her testimony that Mr. Gottlieb did anything, on
13 the grounds of foundation. I think she can testify
14 that her system contains information shown on these
15 screens. But I think for her to say that my client
16 did anything, exceeds her foundation. She has never
17 seen him. And she wasn't sitting next to him. So
18 it's to foundation.

19 THE COURT: Well, I think it's understood
20 that her testimony is that this is Nexus Holding's
21 account, and that Mr. Gottlieb is the primary user.

22 BY MR. MCKAY:

23 Q So page 2 of Exhibit 3 shows the services

1 that had been purchased; is that correct?

2 A Yes.

3 Q What does page 3 of Plaintiff's Exhibit 3
4 show?

5 A Page 3 is showing the order history for
6 NexusHoldings.com, for the domain name.

7 Q What does that tell you, with the
8 knowledge that you have of how the company's records
9 are maintained?

10 A It's showing the creation date for the
11 domain name and also the renewal dates.

12 Q It shows a creation date of what?

13 A 10/31 of 2003.

14 Q And how many renewals does it show?

15 A There are four renewals. One on 10/25 of
16 2004, on 10/12 of 2005, 9/18 of 2006, and 10/4 of
17 2007.

18 Q All right. Did you move beyond this
19 screen that is marked as page 3 of Exhibit 3?

20 A I did. Page 4 is showing the order
21 history for the e-mail address
22 Brett@NexusHoldings.com.

23 Q So page 3 was the domain name?

1 A Page 3 was the domain name order history.

2 Q And page 4 is the e-mail history?

3 A Correct.

4 Q What does page 4 tell you, as you
5 understand the records of Nexus?

6 A Page 4 is showing the creation date and
7 also the renewal dates for the e-mail address.

8 Q For NexusHoldings.com?

9 A For Brett@NexusHoldings.com.

10 Q And does it show registration and renewal
11 dates that are comparable to the registration and
12 renewal dates of the domain name?

13 A Yes, it does.

14 Q All right. I would like for you to turn
15 to the exhibits that are marked 4 through 8. And
16 let's start with Exhibit Number 4. Could you tell
17 the court what that is?

18 A Exhibit 4 is the service agreement that
19 was in place in 2003.

20 Q And does that agreement contain a forum
21 selection clause?

22 A Yes, it does.

23 Q What paragraph is that?

1 A It's paragraph 21, section A.

2 Q All right. Turn, if you would, to Exhibit
3 5. Tell the court what that is?

4 A Exhibit 5 is the service agreement that
5 would have been in place in 2004.

6 Q And that would have been in place at the
7 time of the first renewal by Mr. Gottlieb; is that
8 right?

9 A Yes, that was the first renewal.

10 Q And does it contain a forum selection
11 clause?

12 A It does. It is also paragraph 21, section
13 A.

14 Q Okay. What is Exhibit 6?

15 A Exhibit 6 is showing the service agreement
16 that was in place in 2005.

17 Q And that would have been in place at the
18 that time Mr. Gottlieb went through the renewal
19 process for both the domain name and e-mail account
20 in October of 2005?

21 A Correct.

22 Q Does it have a forum selection clause?

23 A Yes, it does.

1 Q And what paragraph is that?

2 A That's also paragraph 21, section A.

3 Q All right. Would you tell the court what
4 Exhibit 7 is?

5 A Exhibit 7 is the service agreement that
6 was in place in 2006.

7 Q And that would have been in place at the
8 time of the renewal that you showed us in Exhibit 3,
9 in October of 2006; correct?

10 A Yes. I believe it was September of 2006.

11 Q And does Exhibit Number 7, the 2006
12 agreement, have a forum selection clause?

13 A Yes. It is paragraph 21, section A, as
14 well.

15 Q Okay. Would you tell the court what
16 Exhibit Number 8 is?

17 A Exhibit 8 is showing the service agreement
18 that was in place in 2007.

19 Q And that was the agreement that was in
20 place on October 4th, 2007, when Mr. Gottlieb
21 renewed both the domain name and the e-mail account?

22 A Correct.

23 Q And does Plaintiff's Exhibit Number 8 have

1 a forum selection clause?

2 A Yes, it does. And it's also paragraph 21,
3 section A.

4 Q Ms. Sterling, you talked about Mr.
5 Gottlieb having access to an e-mail system that has
6 been in place from October 2003 --

7 A Yes.

8 Q -- to date. If one sends e-mail across an
9 e-mail account at Network Solutions, does it have to
10 cross a server?

11 A Yes, it does.

12 Q And where are those servers located?

13 A They're located in Sterling, Virginia.

14 Q And do all e-mails that go through an e-
15 mail account maintained in Network Solutions, cross
16 those Virginia servers?

17 A Yes, they do.

18 MR. MCKAY: Court's indulgence for one
19 moment, Your Honor?

20 THE COURT: Yes.

21 MR. MCKAY: Your Honor, I don't have any
22 other questions. I don't think there are any
23 objections to my exhibits, so I move my exhibits

1 into evidence.

2 THE COURT: All right. Is that correct,
3 that there are no objections to the exhibits?

4 MR. SUROVELL: Correct.

5 THE COURT: All right. All of the
6 Plaintiff's exhibits are moved into evidence.

7 (The items referred to above were
8 received into evidence as Plaintiff's
9 Exhibits Nos. 1 through 8.)

10 THE COURT: Any cross examination?

11 MR. SUROVELL: Yes, ma'am.

12 CROSS EXAMINATION

13 BY MR. SUROVELL:

14 Q Good morning, Ms. Sterling. On Exhibits
15 Numbers 1 and 2 --

16 A Yes.

17 Q -- these screen shots were taken in just
18 the last few days?

19 A They were taken within the last few weeks,
20 yes.

21 Q Okay. And you don't have any screen shots
22 -- Isn't it true that these screens we're looking
23 at, have changed since 2004?

1 A They have changed somewhat since 2004,
2 yes.

3 Q All right. We don't have any documents in
4 court today that show exactly how they've changed;
5 do we?

6 A No, we don't.

7 Q Now, regarding these screens shown in
8 Exhibit Number 1 and Number 2, you're not a software
9 engineer; correct?

10 A Correct.

11 Q You're not a web designer; right?

12 A No.

13 Q You didn't program or write the coding
14 that created these screens; did you?

15 A No, I did not.

16 Q Are you familiar with how website software
17 language works?

18 A No, I'm not.

19 Q So you haven't actually looked at the
20 coding behind these screens yourself, to see exactly
21 what instructions have been given to the computers
22 to tell them what to do; have you?

23 A No, I have not.

1 Q So basically all you're saying today is
2 that you went through the process shown on here,
3 clicked on the boxes, and this is what you saw
4 happen?

5 A Correct.

6 Q Now, are there any other ways to register
7 for domain names at Network Solutions, besides the
8 website?

9 A They can call into customer service.

10 Q So the individual can make a phone call
11 and register for a domain name?

12 A Correct. They would be walked through the
13 process.

14 Q So they would still have to do it on a
15 computer?

16 A They would need to be on their computer.
17 But customer service would be walking them through
18 the process.

19 Q Okay. So you're telling us, I guess from
20 your point of view, the only way to get a domain
21 name through Network Solutions is on this website?

22 A Correct.

23 Q Has that always been the case?

1 A I'm not sure if that has always been the
2 case.

3 Q Exhibit 3 doesn't really specifically tell
4 us exactly how the person registered for the domain
5 name; correct?

6 A Correct.

7 Q It just tells us that they did?

8 A Correct.

9 Q Now, you all are not an ISP; correct?

10 A No.

11 Q Just so the record is clear, an ISP would
12 be an Internet Service Provider; is that right?

13 A Yes, it is.

14 Q Okay. Has Network Solutions ever out-
15 sourced its e-mail application?

16 A Not that I'm aware of.

17 Q You are aware that some of these documents
18 reference a company called VeriSign; right?

19 A Yes.

20 Q Is VeriSign a subsidiary of Network
21 Solutions, or a former parent company, or what
22 exactly was that relationship?

23 A At one time VeriSign owned Network

1 Solutions. We were a VeriSign company.

2 Q And when did that change?

3 A I'm not sure of the exact date that that
4 changed.

5 Q It was during the time frame we're talking
6 about here today; right?

7 A Yes, it was.

8 Q Isn't it true that VeriSign has some
9 servers outside of Virginia?

10 A If it did, I'm not sure.

11 Q So it's possible that some of the activity
12 that you've discussed today may have occurred on
13 servers outside of Virginia?

14 MR. MCKAY: Objection. Lack of
15 foundation, Your Honor.

16 THE COURT: You would have to establish
17 that she would know that.

18 BY MR. SUROVELL:

19 Q Ma'am, you were the fraud compliance
20 officer in 2004?

21 A Yes, fraud investigator.

22 Q Sorry, the fraud investigator. As part of
23 that, wouldn't you be required to know where the

1 servers were?

2 A No. We dealt with credit card fraud.

3 Q So how do you know where the servers are
4 today?

5 A I've been to the location where the
6 servers are in Sterling.

7 Q When was the first time you went?

8 A That would have been I guess about a week
9 ago.

10 Q All right. So you don't know where the
11 servers were before a week ago?

12 A No.

13 Q So then your testimony for today is simply
14 that as of right now, the servers are located in
15 Sterling, Virginia. But before that, you don't know
16 where they were.

17 A As far as I know, they've always been in
18 Virginia. But I've only been there once and that
19 was a week ago.

20 Q Now, it's accurate to say that Exhibit
21 Number 3, which is the account history --

22 A Yes.

23 Q -- it's accurate to say that that document

1 does not contain any information which would allow
2 anyone to see whether or not a person has actually
3 read any of these service agreements; correct?

4 A Correct.

5 Q Have you ever signed up for internet
6 services for other companies?

7 A Yes.

8 Q And you're aware of the fact that for many
9 other companies, at least it's possible to create a
10 box with language that you can scroll through when
11 you click on the "agree" button; correct?

12 A Yes.

13 Q And to the best of your knowledge, Network
14 Solutions has never had that type of a system in
15 place during the time period we're talking about in
16 this case?

17 A I don't know.

18 Q Network Solutions does not have any
19 records that indicate that Mr. Gottlieb ever clicked
20 on the link for the terms of the service agreement;
21 correct?

22 A For him to be able to purchase the domain
23 name, he would have had to have put a check in that

1 box, or he would have received an error.

2 Q Okay. Let me ask the question again. I
3 think we're talking about apples and oranges. You
4 understand that there's a --

5 THE COURT: I think he's asking you: You
6 can't tell whether he actually went to that site,
7 clicked on that link to the agreement, or just blew
8 by it?

9 THE WITNESS: I can't tell that he
10 actually read it, no.

11 BY MR. SUROVELL:

12 Q But it would be possible for Network
13 Solutions to actually maintain a record of whether
14 he clicked on that link, relative to his
15 transaction; right?

16 A I'm not sure if there's a specific record
17 that shows that.

18 Q But it would be possible for Network
19 Solutions to enable their system to capture that
20 information; correct?

21 MR. MCKAY: Objection. Lack of
22 foundation.

23 THE COURT: I'll overrule the objection.

1 THE WITNESS: I don't know if that would
2 be possible.

3 MR. SUROVELL: Okay.

4 BY MR. SUROVELL:

5 Q Now, you're not aware of Network Solutions
6 ever placing anything on any of their websites
7 similar to Exhibits 1 or 2 in the last four years
8 that specifically states anything about someone
9 consenting to personal jurisdiction in Virginia; are
10 you?

11 MR. MCKAY: Objection. Ambiguous, Your
12 Honor.

13 THE COURT: I sustain the objection.

14 BY MR. SUROVELL:

15 Q To the best of your knowledge, on any of
16 the registration and renewal screens, there has
17 never been information stating anything about forum
18 selection clauses; correct?

19 A Nothing specific, no.

20 Q You would agree that there's nothing
21 contained within Network Solutions records that
22 you've seen that would indicate that Mr. Gottlieb
23 had any negotiations over these services; correct?